Office - Supreme Court, U.S.
FILED
SEP 22 1982
ALEXANDER L. STEVAS,
CLERK

82-499

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

JOHN D. COLE, III,
PETITIONER,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
SEYMOUR YANOFF AND AMY KONOWITZ,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

PAUL R. DEVIN,

ALEXANDER H. PRATT, JR.,
HARVEY WEINER,
PEABODY & ARNOLD,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 523-2100

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Whether constitutional standards first established by this Court in *New York Times Co.* v. *Sullivan* displace state law in cases of private defamation.

2. Whether those constitutional standards require a state court to depart from its settled rule of procedure for judgment notwithstanding the verdict by permitting issues abandoned during trial to be revived after a jury verdict and judgment.

3. Whether those constitutional standards immunize statements which otherwise would be defamatory *per se* because they attribute professional malpractice to a television journalist.

Table of Contents.

Opinion below	1
Jurisdiction	2
Constitutional provisions involved	2
Statement	3
Reasons for granting the writ	8
Conclusion	22
Appendix A: Supreme Judicial Court Opinion	1a
Appendix B: Supreme Judicial Court Docket	12a
Appendix C: Mass. R. Civ. P. 50	13a

Table of Authorities Cited.

Cases.

Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976)	20
Burns v. Barry, 353 Mass. 115, 228 N.E.2d 728 (1967)	18
Calero v. Del Chemical Corp., 68 Wis.2d 487, 228 N.W.2d 737 (1975)	10
Craig v. Proctor, 229 Mass. 339, 118 N.E. 647 (1918)	18
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	14, 15, 21
Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U.S. 157 (1917)	2
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	8, 9
Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970)	20, 21
Harley-Davidson Motor Sports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977)	10
House of Koscot Development Corp. v. American Line Cosmetic, Inc., 468 F.2d 64 (5th Cir. 1972)	11

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 10

Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) 20

Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) 10

John v. Paullin, 231 U.S. 583 (1913) 13

Myers v. Boston Magazine Co., Mass. Adv. Sh. (1980) 907, 403 N.E.2d 376 (1980) 19, 20

National Association of Government Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935 (1980) 15, 16

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 4, 7, 10, 12, 13 et seq.

Old Dominion Branch No. 496 National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974) 18, 20

Oregon v. Hass, 420 U.S. 714 (1975) 2

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) 2

Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, cert. denied, 434 U.S. 969 (1977) 20

Rollins Environmental Services, Inc. v. Superior Court, 368 Mass. 174, 330 N.E.2d 814 (1975) 11

Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978) 10

Stuempges v. Park, Davis & Co., 297 N.W.2d 252 (1980) 10

Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975) 19

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 10

Widener v. Pacific Gas and Electric Co., 75 Cal. App. 3d 415, 142 Cal. Rptr. 304 (1977), cert. denied, 436 U.S. 918 (1978) 19

Wolfe v. North Carolina, 364 U.S. 177 (1960) 13

Yakus v. United States, 321 U.S. 414 (1944) 14

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 2, 21

STATUTES.

28 U.S.C. 1257(3) 2

Mass. R. Civ. P. 50(b) 10, 11, 12

MISCELLANEOUS.

F. Harper & F. James, The Law of Torts § 5.28 (1956) 19

Restatement of Torts § 606 (1938) 18, 19

Restatement (Second) of Torts § 566 (1977) 15, 16, 17, 18, 19

J. Smith & H. Zobel, Rules Practice, Massachusetts Practice Series § 50.14 (1977) 11

Wright & Miller, Federal Practice and Procedure § 2537 (1971) 11

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

JOHN D. COLE, III,
PETITIONER,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
SEYMOUR YANOFF AND AMY KONOWITZ,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

John D. Cole, III, petitions for a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 386 Mass. 303 (1982). A copy of the opinion appears in Appendix A.

Jurisdiction.

The opinion and order of the Supreme Judicial Court of Massachusetts were entered on May 20, 1982 (Appendices A and B). A timely Petition for Rehearing was denied on June 25, 1982 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), because a title, right, privilege or immunity was claimed under the Constitution of the United States by the defendants below, which claim was sustained by the Supreme Judicial Court of Massachusetts on the basis of decisions of this Court.

The petitioner contends that the decisions of this Court require no such result and that the Supreme Judicial Court of Massachusetts should be so instructed. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975); *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952). Alternatively, any non-constitutional grounds for the Supreme Judicial Court's decision are so interwoven with the constitutional grounds so as not to be independent or are insufficiently broad to sustain the decision without the constitutional grounds. *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No states shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement.

Petitioner, John D. Cole, III, was fired from his job as a political news reporter at television station WBZ-TV in Boston in March, 1975. The spokesperson for WBZ (operated by respondent Westinghouse Broadcasting Company, Inc.) answered questions from two newspaper reporters by saying that Cole was fired because he was a "sloppy and irresponsible reporter" and had a "history of bad reporting techniques." Cole brought this action for defamation against Westinghouse, the general manager of the station (Seymour Yanoff) and the station spokesperson (Amy Konowitz) after these statements were republished by the newspapers. Over Cole's objection, the jury was instructed that Cole was required to prove by clear and convincing evidence that the defendants acted with actual

malice as defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and subsequent cases. A two-week trial resulted in a jury verdict for Cole for $100,000 in compensatory damages.

At trial, Cole introduced evidence that he was not guilty of the professional malpractice imputed to him by the station's statements to the reporters, and, to show actual malice, he introduced evidence that these statements were fabricated by the station as a cover-up for the real reasons for his firing. He contended and the jury decided that he was fired because Yanoff and Westinghouse bowed to political pressure from Boston Mayor Kevin H. White (whose campaign fundraising Cole was investigating with a series of news stories) and because Cole was resisting the new "happy talk" style of local television news which Yanoff was implementing at WBZ. Relying primarily on decisions of this Court, the Supreme Judicial Court disregarded settled rules of procedure and reversed, holding the statements imputing journalistic malpractice to Cole to be non-actionable opinions.

A more detailed statement of the facts is necessary, because the Supreme Judicial Court's opinion ignores Cole's view of the evidence, which was before it and which the jury must be assumed to have accepted.

Cole's "investigative reporting" on the Mayor's re-election campaign fundraising uncovered questions about the propriety of some of the Mayor's activities. The Mayor's office retaliated with harrassment of WBZ and surveillance of Cole. At one point, the Mayor and WBZ's news director, William Aber, met for lunch to discuss the situation. The Mayor made it clear that it would be better for all concerned if Cole no longer worked in Boston. Cole's unfavorable campaign coverage of Mayor White in an earlier campaign (when he was an unsuccessful candidate for Governor) had been curtailed by WBZ following a threat of retaliation by the Mayor against

WBZ. On several occasions in 1974 and 1975, Yanoff indicated to Cole that he should focus on something other than the Mayor's fundraising.

Finally, on March 12, 1975, Aber called Cole into his office and told him that he had been directed by Yanoff to tell Cole that the station management did not like Cole's investigation of Mayor White or his attitude about "happy talk" (which then was a new style of local television news in which the on-the-air personalities engage in chit-chat with each other throughout the show). Cole had recently rejected an offer from WBZ to become a co-anchorman on the news shows because it would require him to engage in "happy talk" on the air and prevent him from continuing his serious political reporting. Aber said that it should be clear to Cole that he had no future at WBZ and, therefore, that he should suggest an amount of money which he would accept to leave the station. Cole replied that he wanted to continue his investigation of the Mayor's fundraising until it was picked up by some official body with subpoena powers.

The following day, March 13, 1975, Cole covered a public meeting of the Boston Finance Commission, which is a public agency with investigative powers. At the meeting, the chairman of the Commission noted that Cole had prepared television news stories and written newspaper articles about the Mayor's fundraising. The chairman said that he thought the Commission should investigate the matter. The Commission proceeded to vote to undertake such an investigation. Cole then sought, but did not succeed in obtaining, a reaction to the Commission's vote from the Mayor's office.

Upon returning to the WBZ newsroom, Cole was given some film which had been taken by WBZ's consumer reporter at a press conference by Mayor White on a consumer matter. That press conference had occurred several hours *before* the Finance Commission meeting. Cole was told by the consumer

reporter and the producer of the news show that this film showed the Mayor making a general statement about fundraising in response to a question which had not been filmed by WBZ because it had been asked by a reporter from another station. Cole elected not to use this film in his own news story, because WBZ did not know the question asked the Mayor and because the Mayor's statement had occurred several hours before the Finance Commission meeting where the vote was taken to proceed with the investigation. Cole's report became the "top story" on WBZ's news show that evening. Later in the show, Aber caused another story to be run including the Mayor's statement about fundraising at the press conference attended by the consumer reporter. To introduce this story, one of the anchormen said, "Mayor White was asked today at a City Hall news conference about the FinCom investigation into his fundraising that Jack Cole reported earlier in this newscast. The Mayor replied. . . ." Aber complained to Yanoff that Cole should have presented the Mayor's statement in this fashion. Cole contended that it would be misleading to the viewers to present the Mayor's statement as a response to an event which had not yet occurred when the statement was made.

Cole was immediately suspended and later fired. Yanoff prepared a written statement to be released by WBZ in response to inquiries about Cole's termination. It said that Cole had been terminated "for reasons of misconduct and insubordination." Yanoff's pre-trial deposition testimony, which was admitted into evidence at trial, was that he had given the statement directly to Amy Konowitz, who had no involvement with the WBZ news reporters on a day-to-day basis. At trial, Yanoff admitted changing his story and said that he had given the statement to Alex Dusek, Konowitz's superior.

Amy Konowitz received inquiries about why Cole was fired. When asked for comment beyond Yanoff's statement referring

to "misconduct and insubordination," Konowitz told a reporter for the *Boston Globe* that Cole's firing was a case of "sloppy and irresponsible reporting." She was similarly asked for information beyond the Yanoff statement by a reporter for the *Boston Phoenix*, who asked whether the Finance Commission story had been the specific reason for Cole's firing. Konowitz replied, "That was just the last straw. Jack [Cole] was fired for history of bad reporting techniques." Konowitz's comments were republished by the newspapers.

In July, 1975, after Cole's termination, Mayor White said to a reporter for the *Boston Globe*, "I'll get you just like I got Cole if you don't get off my case."

Cole commenced this action for defamation in Suffolk Superior Court in April, 1975. All defendants moved for directed verdicts at the close of the plaintiff's case, and Konowitz's motion was allowed. Westinghouse and Yanoff moved again for directed verdicts at the close of all the evidence. Neither Westinghouse nor Yanoff contended in any of these motions that the statements "sloppy and irresponsible reporting" and "history of bad reporting techniques" as reasons for Cole's firing were non-actionable statements of opinion, nor did their counsel so argue. In addition to the verdict for Cole for $100,000, the jury found in answer to the special question that Cole was a public figure.

Westinghouse and Yanoff subsequently moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, contending that the foregoing statements were non-actionable opinion. These motions were denied. Westinghouse and Yanoff appealed. Cole cross-appealed from the judgment for Konowitz and from the trial court's application of constitutional standards flowing from *New York Times Co. v. Sullivan*. The Supreme Judicial Court of Massachusetts reversed, holding on constitutional grounds that the statements were non-actionable statements of opinion.

Reasons for Granting the Writ.

There is Conflict Among State Courts of Last Resort About Whether Constitutional Standards Apply to Cases of Private Defamation, Which This Court Has Recognized as an Open Question.

The Supreme Judicial Court held that the statements that Cole was fired for being a "sloppy and irresponsible reporter" with a "history of bad reporting techniques" were non-actionable statements of opinion. As discussed more fully below (at p. 19), this holding was on constitutional grounds. Thus, the Supreme Judicial Court's application of constitutional standards to determine what statements are actionable implicitly rejected Cole's contention in his cross-appeal that such standards do not apply to cases of private defamation, i.e., cases between a non-media defendant and a public person with respect to a private matter.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court addressed the following problem:

> The principal issue in this case is whether a *newspaper* or *broadcaster* that publishes defamatory falsehoods about an individual who is neither a public official nor public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. *Id.* at 332 (emphasis added).

This Court held in *Gertz* that, so long as they do not impose liability without fault, the states may define for themselves "the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347. This result was reached by balancing the

competing interests, which are the individual's right to the protection of his own good name (which has been the subject of the states' common law of defamation) and the need to avoid "media self-censorship" induced by the strict liability standard (i.e., truth as a defense) usually imposed by that common law. *Id.* at 340-343. Thus, both by the nature of the analysis and the language used by this Court, *Gertz* is applicable to cases involving private plaintiffs and media defendants. It has no application to an action by a private plaintiff (or by a public plaintiff in relation to a private matter) against a non-media defendant. In this case, WBZ did not state on its own news program that Cole was fired for being a "sloppy and irresponsible reporter" with a "history of bad reporting techniques." Thus, WBZ was acting like any other private employer in responding to inquiries about a former employee rather than as a media defendant conveying news directly to the public.

In response to the special question the jury found that Cole was a public figure, but Cole appealed the trial court's refusal to instruct the jury that a person who is a public figure for most purposes is to be treated as a private person if the defamation is in relation to a private matter. This distinction grows out of this Court's opinion in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), where it was stated:

> We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise the defamation. *Id.* at 352.

Cole contended that his employment relationship with WBZ was not a public matter, that the newsworthiness of his firing did not make it a public matter, *Time, Inc.* v. *Firestone*, 424 U.S. 448, 453-455 (1976), and that WBZ's publicizing it did not make it a public matter, *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135-136 (1979).

Thus, Cole's cross-appeal presented the question of the applicability of the constitutional standards initially enunciated in *New York Times Co.* v. *Sullivan* to a case of a private plaintiff (i.e., a public figure but in relation to a private matter) and a non-media defendant. This Court has noted that this is an open question. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 n.16 (1979). State courts of last resort are in conflict on this question. In Maryland, the Court of Appeals held constitutional standards to apply to private defamation in an action by an employee against the former employer in *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A.2d. 688 (1976). Other courts have applied common law rules to such cases. *Stuempges* v. *Park, Davis & Co.*, 297 N.W.2d 252 (1980); *Rowe* v. *Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley-Davidson Motor Sports, Inc.* v. *Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Calero* v. *Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975). The time has come for this Court to resolve this controversy by determining whether the constitutional standards apply to cases of private defamation.

THE SUPREME JUDICIAL COURT HAS MISCONSTRUED THE DECISIONS OF THIS COURT AS REQUIRING IT TO DEPART FROM ITS SETTLED RULE OF PROCEDURE THAT JUDGMENT NOTWITHSTANDING THE VERDICT MAY NOT BE ENTERED ON A GROUND NOT STATED IN THE MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE.

Rule 50 of the Massachusetts Rules of Civil Procedure (the provisions of which are set forth in Appendix C) is patterned

on the parallel Federal Rule and, with respect to motions for judgment notwithstanding the verdict, is identical. The requirements of the Massachusetts Rule are well settled:

> Because a motion for judgment n.o.v. in effect seeks to provoke a ruling on a prior motion for directed verdict (made at the close of all the evidence), obviously the earlier motion is a prerequisite to the granting of the later one; failure to move for a directed verdict precludes moving later for judgment n.o.v. Further, a motion for directed verdict based upon one stated ground cannot father a motion for judgment n.o.v. based upon a different ground, even if the second ground is otherwise valid. J. Smith & H. Zobel, Rules Practice § 50.14, Massachusetts Practice Series (1977) (citations omitted).

The Supreme Judicial Court has stated that where, as here, the Massachusetts and Federal Rules are in the same or substantially the same form, the adjudged construction given to the Federal Rule is to be given to the parallel Massachusetts Rule absent compelling reasons to the contrary. *Rollins Environmental Services, Inc.* v. *Superior Court*, 368 Mass. 174, 179-180, 330 N.E.2d 814, 818 (1975). It is settled that the requirements of the Federal Rule for the foundational motion are the same. E.g., *House of Koscot Development Corp.* v. *American Line Cosmetic, Inc.*, 468 F.2d 64, 66 (5th Cir. 1972); Wright & Miller, Federal Practice and Procedure § 2537 (1971), and cases cited at n.37.

Notwithstanding the clarity of the requirements of Mass. R. Civ. P. 50(b), the Supreme Judicial Court refused to enforce them in this case. The defendants' motions for directed verdict after the plaintiff's case and at the close of the evidence did not assert that the statements in issue were non-actionable

opinion, but the trial judge's denial of judgment notwithstanding the verdict was reversed on this ground. The only authority cited by the Supreme Judicial Court for this departure from Rule 50(b) was *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). However, it is abundantly clear that nothing in *New York Times* requires or even suggests this result. There, this Court stated its scope of review broadly:

> Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser* v. *Randall*, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp* v. *Florida*, 328 U.S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U.S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372. We must "make an independent examination of the whole record," *Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. 376 U.S. at 284-285 (1964) (footnote omitted).

The cases cited in this passage involve findings of fact or procedures for finding facts which, if themselves immune from review, would prevent the reviewing court from reaching a constitutional question of law. The Supreme Judicial Court was not faced with this problem and has misapplied the *New York Times* rule to an entirely different situation. What the Supreme Judicial Court has done is to reach out for an issue which the defendants themselves did not properly preserve for appellate review (or even for review by the trial court after the jury's verdict) according to the settled state procedure and use it to overturn the jury's verdict.

The decisions of this Court demonstrate that *New York Times* was not intended to require this result. It is well settled that, in the absence of evasion, state procedures govern the raising and preservation of even constitutional issues.

> Without any doubt it rests within each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960), *quoting John* v. *Paullin*, 231 U.S. 583, 585 (1913) (citations omitted).

Specifically, this Court will not reach out for even constitutional issues which have not been properly preserved by the parties:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in crimi-

nal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *Yakus* v. *United States*, 321 U.S. 414, 444 (1944).

Even if the foregoing are statements of only generally applicable rules, *New York Times Co.* v. *Sullivan* cannot be taken to adopt a different rule for cases of possible conflict between the requirements of the First and Fourteenth Amendments and state law of defamation. In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 142-145 (1967), this Court proceeded through a lengthy analysis of the question of whether the constitutional issues raised by Curtis were properly before it. If this Court had intended *New York Times* to have the effect which the Supreme Judicial Court of Massachusetts gave it, this analysis would have been entirely superfluous. Like the Supreme Judicial Court, this Court simply could have grasped the constitutional issue which it perceived, citing *New York Times*, without any regard to the procedural history. By undertaking the procedural analysis, this Court demonstrated its own intent that the *New York Times* rule for scope of review does not extend as far as the Supreme Judicial Court of Massachusetts tried to take it in this one case.

The Supreme Judicial Court's misapplication of *New York Times* engenders mischief far beyond this single case presented by Cole. The purpose of firm procedural rules is to permit reliance by parties in the trial of cases where their vital interests are at stake. The fact that constitutional values may be involved in a particular case is no excuse to disregard the generally applicable and firm procedural rules. Constitutional values are better protected by procedural order than by procedural confusion. The Supreme Judicial Court's view that the First Amendment requires it to take a roving commission to dispose

of the case on any basis which it sees, rather than limiting itself to the issues properly preserved by the parties, permits a party to avoid taking a certain position at one stage of the litigation for tactical reasons and, later, to have a manifestly unfair second chance to press the position if the original tactic fails. *See Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 168 (1967) (Warren, C.J., concurring in result). If the trial judge remembered the pre-trial motion to dismiss on the ground of non-actionable opinion (which motion the Supreme Judicial Court's opinion notes was not ruled upon, 386 Mass. at 307) in the context of the directed verdict motions at the close of the evidence (which omitted this ground), his only logical conclusion would have been that this ground had been abandoned for tactical reasons. In fairness and to uphold reliable procedural rules, he refused to permit the issue to be revived after the tactic failed-and the jury had given its verdict to Cole. The Supreme Judicial Court should be instructed that the First Amendment does not require the contrary.

THE SUPREME JUDICIAL COURT OF MASSACHUSETTS HAS MISTAKENLY USED THE FIRST AND FOURTEENTH AMENDMENTS TO IMMUNIZE STATEMENTS WHICH OTHERWISE WOULD BE DEFAMATORY *Per Se* BECAUSE THEY ATTRIBUTE PROFESSIONAL MALPRACTICE TO A TELEVISION JOURNALIST.

As a matter of the Massachusetts law of defamation, the Supreme Judicial Court seems previously to have adopted the Restatement (Second) of Torts § 566 (1977). *National Association of Government Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 227-228, 396 N.E.2d 996, 1000-1001 (1979), cert. denied, 446 U.S. 935 (1980). Section 566 states:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

The Supreme Judicial Court also seems to read § 566 as superseding prior rules of fair comment. *National Association of Government Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. at 227 n. 8. Comment c to § 566 recapitulates the effect of this rule in terms of four fact patterns, only the first and fourth of which subject the speaker to liability:

> (1) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of false and defamatory facts, he is subject to liability for the factual statement but not for the expression of opinion.
>
> (2) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of facts that are not defamatory, he is not subject to liability for the factual statement — nor for the expression of opinion, so long as it does not reasonably indicate an assertion of the existence of other, defamatory, facts that would justify the forming of the opinion. The same result is reached if the statement of facts is defamatory but the facts are true (see § 581B), or if the defendant is not shown to be guilty of the requisite fault regarding the truth or defamatory character of the statement of facts (see §§ 580A and 580B), or if the statement of facts is found to be privileged. (See § 593-612.)
>
> (3) If the defendant bases his expression of a derogatory opinion on the existence of "facts" that he does not state but that are assumed to be true by both parties to the communication, and if the communication does not

> give rise to the reasonable inference that it is also based on other facts that are defamatory, he is not subject to liability, whether the assumed facts are defamatory or not.
>
> (4) If the defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts. *It makes no difference whether this is explained by holding that there was thus a publication of false, defamatory facts* (thus making § 565 applicable) *or that an expression of a mixed opinion can itself be a defamatory communication.* Restatement (Second) of Torts § 566 comment c (1977) (emphasis added).

It is most important to note, as the emphasized portion of category (4) points out, that the matter of classifying the statements in issue as fact or opinion ultimately is of no importance. The real question is whether the statement in issue (regardless of how it is labeled) implies additional, unstated facts as the basis for the statement.

The statements that Cole was a "sloppy and irresponsible reporter" and had a "history of bad reporting techniques" in response to the reporters' questions about why Cole was fired clearly fall into category (4) and, thus, are actionable. The unexpressed, defamatory facts implied are that on specific occasions comprising the "history" Cole has been guilty of professional malpractice in his off-the-air activities in preparing his news stories. Allegations of professional malpractice are not incapable of being proved true or false. Such proof is made daily in trial courts to juries. Much of the evidence at Cole's trial concerned his careful preparation of specific news stories while at WBZ. The jury's verdict in favor of Cole must be taken as a finding that the implied facts underlying the alle-

gations of professional malpractice were false. Indeed, such imputations of professional incompetence have traditionally been viewed as such hard core defamation as to be actionable *per se*, without allegation or proof of special damages. *Craig* v. *Proctor*, 229 Mass. 339, 341, 118 N.E. 647, 648 (1918) (slander). As a member of this Court has pointed out:

> It is one thing to say that lawyers are shysters and that doctors are quacks, but it is quite another matter — indeed, it is libellous *per se* — to publish that lawyer Jones is a shyster or that Doctor Smith is a quack. *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO* v. *Austin*, 418 U.S. 264, 297 (1974) (Powell, J., dissenting).

Moreover, the statements by Konowitz were outside the privilege available to a former employer when responding to an inquiry from a prospective employer about the former employee, because the reporters to whom she spoke were not acting as prospective employers. See *Burns* v. *Barry*, 353 Mass. 115, 119, 228 N.E.2d 728, 731 (1967). Thus, *Cole* presents the type of case where the law is most protective of the party defamed.

Under the law of fair comment found in the first Restatement of Torts § 606 (1938), statements were privileged only if, among other things, they were upon known or available facts. Comment b to § 606 makes clear that the distinction there between actionable and non-actionable expressions of opinion is fundamentally the same as under § 566 of the Restatement (Second) of Torts. Additionally, to be privileged fair comment, the statement had to represent the actual opinion of the speaker. The jury's verdict for Cole must be taken to have shown that the statements by Konowitz were not the real opinion of Yanoff or Konowitz but were fabricated as a cover-up

for the real reasons for Cole's firing. *See Widener* v. *Pacific Gas and Electric Co.*, 75 Cal. App. 3d 415, 436-37, 142 Cal. Rptr. 304, 315 (1977), cert. denied, 436 U.S. 918 (1978); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 867, 330 N.E.2d 161, 173 (1975). Finally, "misconduct and insubordination" as the "official" reasons for Cole's termination cannot serve as stated facts upon which the further statements "sloppy and irresponsible reporter" and "history of bad reporting techniques" might be based (so as to render the latter statements non-actionable). The statements "sloppy and irresponsible reporter" and "history of bad reporting techniques" cannot be inferred from the statement "misconduct and insubordination" alone, without some additional information. Thus, the former statements suggest that such additional, unstated information exists to justify the former statements. Here, that implied information is that Cole had been guilty of professional malpractice on the occasions comprising the "history." The Restatement of Torts states that, for fair comment, "[i]t is necessary . . . that the comment have some relation to the facts upon which it is made. If it has not, *it may well be taken to imply the existence of other undisclosed defamatory facts* (see Comment *b*)." Restatement of Torts § 606 Comment c (emphasis added). See also F. Harper & F. James, The Law of Torts § 5.28 at 459-460 (1956).

The Supreme Judicial Court of Massachusetts has misinterpreted the First and Fourteenth Amendments as requiring that the statements attributing professional malpractice to Cole be treated as non-actionable opinions. The Supreme Judicial Court clearly views the distinction between fact and opinion as having constitutional significance. *Myers* v. *Boston Magazine Co.*, Mass. Adv. Sh. (1980) 907, 911 n. 3, 403 N.E.2d 376, 378 n.3. See also, Restatement (Second) of Torts § 566 comment c (1977). The Supreme Judicial Court cites several cases holding statements of opinion to be constitutionally non-

actionable. However, none of them falls into category (4) of the foregoing recapitulation of the Restatement (Second) of Torts § 566. This Court's decision in *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 6 (1970), clearly is a category (2) case, with all of the underlying facts stated. In *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO* v. *Austin*, 418 U.S. 264 (1974), this Court held the word "scab" to be a true statement of fact. The word "traitor" was held to be used in a "loose, figurative sense" as a matter of opinion rather than fact. *Id.* at 284. In contrast, there is nothing loose or figurative about the words "sloppy and irresponsible reporter" and "history of bad reporting techniques" when stated in response to the question why Cole was fired. These responses are either factual or, if opinion, suggestive of unstated facts and, in either event, actionable under category (4). By contrast, *Myers* v. *Boston Magazine Co., Inc.*, Mass. Adv. Sh. (1980) 907; *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980); *Buckley* v. *Littell*, 539 F.2d 882 (2nd Cir. 1976); and *Rinaldi* v. *Holt, Reinhart & Winston, Inc.*, 42 N.Y.2d 369, cert. denied, 434 U.S. 969 (1977), are category (2) or (3) cases. For example, in *Myers* (a category (3) case), the assumed facts were the plaintiff's on-the-air performances in contrast to Cole's off-the-air activities in assembling information and putting together his news stories.

Thus, the Supreme Judicial Court has misapplied all of the foregoing cases, none of which properly falls under category (4), in holding Cole's case, which does fall under category (4), to involve constitutionally non-actionable opinion. Nothing in this Court's decisions in *Old Dominion* or *Greenbelt* requires this result in a category (4) case. Indeed, this Court explicitly distinguished the facts presented in both cases from those that would be presented in a category (4) case. In *Old Dominion*, 418 U.S. at 286, this Court said:

> This is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way to convey a false representation of fact. *See, Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler, supra,* at 13.

Statements of professional malpractice or incompetence go "to the heart of [a plaintiff's] ability to earn a living. . . ." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). The gravity of the state's interest in providing redress in such cases requires further

> clarification of the relationship between libel law and freedom of speech and press, lest the rule of *New York Times* become a talisman . . . which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 135 (1967).

"Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers." *Id.* at 170 (Warren, C.J., concurring in result). This Court should instruct the Supreme Judicial Court that the First Amendment does not deny Cole his proper remedy.

Conclusion.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PAUL R. DEVIN,

ALEXANDER H. PRATT, JR.,
HARVEY WEINER,
PEABODY & ARNOLD,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 523-2100

JOHN D. COLE, III vs. WESTINGHOUSE BROADCASTING COMPANY, INC. & another.[1]

Suffolk. February 1, 1982. — May 20, 1982.

Present: HENNESSEY, C.J., LIACOS, NOLAN, & O'CONNOR, JJ.

Libel and Slander. Practice, Civil, Appeal.

Where the plaintiff in a libel action was not prejudiced by any prematurity in a notice of appeal filed by two defendants on January 21, 1981, this court refused to dismiss the appeal, even though the case technically may not have been ripe for appeal until March 6, 1981, when judgment was entered dismissing the case against a third defendant. [ ]

Although motions for directed verdicts filed by defendants in a libel action did not explicitly rely on the ground that the phrases in question were nonactionable opinions, the issue was properly before this court inasmuch as defendants had raised it before the trial judge before trial in argument on their motions to dismiss and after trial in motions for judgment notwithstanding the verdict. [ ]

Certain allegedly defamatory statements made to newspapermen by a spokeswoman for a television station in explaining the dismissal of an employee of the station, when viewed in their context, constituted nonactionable statements of opinion. [ ]

CIVIL ACTION commenced in the Superior Court on April 2, 1975.

The case was tried before *Good*, J.

The Supreme Judicial Court granted a request for direct appellate review.

Charles R. Parrott (*Mary Lee Jacobs* with him) for the defendants.

Alexander H. Pratt, Jr., & Harvey Weiner for the plaintiff.

[1] Seymour Yanoff.

NOLAN, J. The plaintiff, John D. Cole, III (Cole), brought this action in the Superior Court for alleged defamation by Westinghouse Broadcasting Company, Inc. (Westinghouse), WBZ-TV, Seymour Yanoff, individually and as general manager of WBZ-TV, Amy Konowitz, individually and as official spokesperson for WBZ-TV and Alan Frank, individually and as program manager of WBZ-TV. At the close of the plaintiff's case, the trial judge allowed motions by Frank and Konowitz for directed verdicts, but denied similar motions by Westinghouse and Yanoff.[2] Westinghouse and Yanoff renewed their motions for directed verdicts at the conclusion of the trial and those motions were denied. In response to a special question, the jury found Cole to be a public figure. They returned a verdict in Cole's favor and assessed damages of $100,000. Westinghouse and Yanoff appealed from the judgment on the jury verdict and the denial of their motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. Cole cross-appealed from the judgment entered in favor of Konowitz. We allowed the defendants' application for direct appellate review. We reverse the judgment for Cole.

The evidence may be summarized as follows. Cole began his employment with WBZ-TV in 1969 as a staff reporter. From July, 1971, to July, 1974, he was employed under a written contract as a staff news announcer. Following the expiration of Cole's employment contract in July, 1974, he continued employment with WBZ-TV as a general assignment reporter covered by a collective bargaining agreement. Yanoff became the general manager of WBZ-TV in August, 1973. One William Aber was hired as WBZ-TV news director in October, 1974.

During the winter of 1974-1975, WBZ-TV broadcast a series of reports which Cole had prepared concerning the political fundraising of the mayor of Boston, Kevin White, and his use of the Parkman House. On March 13, 1975,

[2] As to the defendant WBZ-TV see discussion *infra*.

Cole covered a meeting of the Boston Finance Commission (commission) at which the commission voted to investigate Mayor White's fundraising activities. Cole's report was broadcast on the evening news. Aber observed Cole's report and also viewed a broadcast by another local television station which aired a film of Mayor White commenting on the vote of the commission. Cole's report did not include the Mayor's comment although Cole had been told by a WBZ-TV assistant news director that the film was available for use. Yanoff testified at trial that Aber met with him on March 13, 1975, and informed him of the events of the day. The following day Yanoff reviewed written statements prepared by Aber and three members of the news staff concerning the broadcast. Aber recommended Cole's termination on the grounds of "misconduct and incompetence" and detailed the incident concerning the omission of Mayor White's comments which led to this recommendation. Cole was suspended and terminated about one week later.

Yanoff prepared an official statement to be released when the television station received inquiries relating to Cole's termination. The release stated that Cole had been terminated "for reasons of misconduct and insubordination." Yanoff testified at trial that he gave the statement to one Alex Dusek and directed Dusek to give it to Amy Konowitz to use in responding to inquiries from the media.

On March 21, 1975, an article appeared in the Boston Globe newspaper, by Percy Shain, stating that Cole had been fired for "misconduct and insubordination." The article mentioned the incident involving the commission and went on to say that a WBZ-TV spokesman said "unofficially, that Cole's firing was not a direct result of the newscast, but was a case of 'sloppy and irresponsible' reporting." Shain testified at trial that, prior to writing the article, he had called Konowitz and inquired about Cole's suspension. Konowitz read him the official release. Shain then asked her for more information and she said "unofficially" that it was a case of "sloppy and irresponsible reporting." This

is one of the statements which Cole claims to be defamatory.

About the same time, David O'Brian, a columnist for the Boston Phoenix newspaper, telephoned WBZ-TV, and spoke with Konowitz. He testified that he asked her why Cole had been terminated and she read to him the WBZ-TV's official statement. He then stated to her that he had heard that Cole had been fired because of the way he had handled the report on the Boston Finance Commission's press conference. Konowitz replied: "That was just the last straw. Jack was fired for a history of bad reporting techniques." O'Brian wrote a column published in the Boston Phoenix newspaper quoting this statement. Cole alleged that this statement was defamatory.

1. *Prematurity of appeal.* Before reaching the merits of this appeal, we shall discuss two preliminary issues raised by the plaintiff. The plaintiff argues that this appeal should be dismissed because of the defendants' failure properly to file notices of appeal. The plaintiff filed a complaint against Westinghouse, WBZ-TV, Yanoff, Konowitz, and Frank. The judge allowed motions for directed verdicts as to Konowitz and Frank. On October 31, 1980, the jury returned a verdict for the plaintiff, on which judgment was entered on November 3, 1980. Westinghouse and Yanoff timely moved for judgments notwithstanding the verdict or, in the alternative, for a new trial. The judge denied the motions on December 23, 1980. On January 21, 1981, Yanoff and Westinghouse filed notices of appeal from the judgment on the jury verdict and the denial of their motions. The plaintiff filed a cross-appeal on January 30, 1981, from the judgment entered in favor of Konowitz. On March 3, 1981, the parties filed a stipulation of dismissal as to WBZ-TV. The plaintiff argues that since judgment was not entered for WBZ-TV until March 6, 1981, the case was not ripe for appeal until that time and the defendants' appeals filed on January 21, 1981, were premature and ineffective.

WBZ-TV is owned and operated by Westinghouse. Although WBZ-TV was designated a separate entity in the

complaint, it is clear that the parties treated WBZ-TV and Westinghouse as one and the same throughout the litigation. Cole did not ask for a judgment against WBZ-TV and filed his notice of cross-appeal from the same judgment from which the defendants appealed in January, 1981. The plaintiff has not been prejudiced by the prematurity, if any, of the notice of appeal and we will not avoid a decision on the merits on the basis of such a technicality. *Hutchinson* v. *Hutchinson*, 6 Mass. App. Ct. 705, 707 (1978), and cases cited.

2. *Specificity of motions for directed verdicts.* The plaintiff next contends that the issue whether the statements alleged to be defamatory constitute fact or opinion has not been properly preserved for review. The plaintiff argues that the issue is not before us because the defendants' motions for directed verdicts did not explicitly rely on the ground that the phrases were nonactionable opinions, but instead asserted that there was no evidence to warrant a jury finding of actual malice on the part of the defendants. We find that the issue is properly before us for several reasons. The defendants, in their oral argument on their motion to dismiss at the outset of the trial, argued at length that the action should be dismissed because the statements were nonactionable opinions. The judge declined to rule on the motion, stating essentially that he wanted to hear evidence concerning the circumstances in which the statements were made before determining their nature. At the directed verdict stage, while the defendants did not expressly raise this issue, they based their motions for a directed verdict on the lack of evidence which would warrant a finding of actual malice on the part of the defendants. Finally, in their motions for judgment notwithstanding the verdict the defendants expressly raised the opinion versus fact issue. While the defendants perhaps should have explicitly included the opinion versus fact distinction in their motions for directed verdicts, their failure to do so does not bar our review of that issue now. The judge had adequate notice of this issue which was fully presented at the pretrial stage

and again at the post-trial stage. In addition, the issue whether sufficient evidence of a defendant's required state of mind exists is closely connected to the issue whether the statement can be characterized as an opinion or a fact. Finally, in a case of this type where constitutional issues are presented, our role as a reviewing court is necessarily broad. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964). We now discuss the merits.

Because the plaintiff is a public figure, this libel action is governed by the constitutional principles first set forth in *New York Times Co.* v. *Sullivan, supra*. Our role in reviewing a libel case of this kind requires careful appellate review of the facts. We must "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect. . . . We must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression" (citations omitted). *Id.* at 285. After undertaking such a review in this case we conclude that the jury verdict for the plaintiff must be set aside. The alleged defamatory statements are nonactionable opinions.

3. *The statements as opinions.* Recently, in *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, Mass. Adv. Sh. (1979) 2485, cert. denied, 446 U.S. 935 (1980), and again in *Myers* v. *Boston Magazine Co.*, Mass. Adv. Sh. (1980) 907, we discussed the law governing defamatory opinions. We started with the premise that "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). The determination whether the allegedly defamatory statements constitute fact or opinion is critical. "In this context courts apply the Constitution by carefully distinguishing between

statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse." *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976). The determination whether a statement is one of fact or opinion is generally considered a question of law. In *Greenbelt Coop. Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 13-14 (1970), the Supreme Court set aside a jury verdict and held that the use of the word "blackmail" to describe the conduct of the plaintiff in that case could not have been understood as a statement of fact and therefore was not libelous as a matter of law. Similarly, in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 283 (1974), the Court held that the publication of Jack London's definition of "scab," containing words suggesting that the plaintiffs had "rotten principles," and were "lacking character," did not constitute libel. "Such words were obviously used . . . in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law." *Id.* at 284. In *Myers* v. *Boston Magazine, Inc.*, *supra* at 912, we applied these principles and held as a matter of law that the statement at issue there was an opinion and could not be the basis of a libel action.

In deciding whether statements can be understood reasonably as fact or opinion "the test to be applied . . . requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published." *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). See *New York Times Co.* v. *Sullivan*, 376 U.S. 254,

285 (1964); *Buckley* v. *Littell*, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977). We applied this test in *Myers*, *supra*, and now apply it here.

The two columnists, Percy Shain and David O'Brian, telephoned Konowitz, in her capacity as a spokesperson for WBZ-TV, seeking information concerning Cole's dismissal. Konowitz read them both the official release which stated in part that Cole was dismissed because of "misconduct and insubordination." Cole did not contend in his complaint that this statement was defamatory. It was only upon further questioning that Konowitz stated "unofficially" that Cole's dismissal was due to "sloppy and irresponsible reporting" and a "history of bad reporting techniques." It is important to our analysis that Cole was a public figure at the time of this incident and that the circumstances surrounding his dismissal were a matter of public interest, as evidenced by the newspaper articles published concerning his dismissal. The official statement prepared by WBZ-TV stated that Cole was contesting his dismissal. Cole testified that he spoke with a member of the press at that time and expressed his view that political pressures played a role in his dismissal. While the situation was probably not the type of heated "public debate" in which "voices could be expected to be raised in sloganeering invective," *National Ass'n of Gov't Employees* v. *Central Broadcasting Corp.*, Mass. Adv. Sh. (1979) 2485, 2493, the context of the statements is a significant factor in our determination of how they could reasonably be understood. As the California court wrote in *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976), "what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion."

Here, the fact that the statements were made in response to inquiries concerning the contested dismissal of a public figure is of some significance in how they could be reasonably interpreted. The audience which received the statements, first the reporters and later those reading the newspaper articles, were aware that Cole and WBZ-TV claimed different reasons for Cole's contested dismissal. The newspaper articles included this information. Both reporters acknowledged that Konowitz had made the statements at issue only in response to their further questioning and after qualifying her remarks as "unofficial." The reporters testified that they understood that her statements were not part of the television station's official release. These factors lend support to our view that the statements were matters of opinion rather than fact.

A review of recent cases in which the opinion versus fact distinction was applied strengthens our view that the phrases "sloppy and irresponsible reporting" and "history of bad reporting techniques," when viewed in their context, could not reasonably be viewed as statements of fact. The case of *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 376, cert. denied, 434 U.S. 969 (1977), involved assertions published by the defendant which stated that a certain judge was among the ten worst judges in New York, had made a "sufficient pattern of incompetent decisions" and should be removed from judicial office. The court held these statements to be nonactionable expressions of opinion, stating that the "[p]laintiff may not recover from defendants for simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be." *Id.* at 380-381. The court distinguished the statement that the plaintiff was "probably corrupt" as this was an accusation of criminal activity that could be proved true or false. *Id.* at 381-382. *Edwards* v. *National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir.), cert. denied sub nom. *Edwards* v. *New York Times Co.*, 434 U.S. 1002 (1977), was an action sounding in defamation brought by certain scientists based on publication of an

article accusing them of being "paid liars" in regard to their support of the continued use of the insecticide DDT. The court distinguished between the phrase "paid liars" and "liars," stating that the first would be actionable as it implies corruption and can be proved true or false whereas the word "liar" merely expressed an opinion and could not be libelous, however mistaken the opinion might be. In *Buckley* v. *Littell*, 539 F.2d 882, 884-885 & n.1 (1976), the court held that the phrases published in a book concerning extremism which stated that the plaintiff was a "fascist," "fellow traveler" of fascism and printed "'news items' and interpretations picked up from the openly fascist journals" were matters of opinion and protected ideas, while the assertion that the plaintiff had lied about and libeled several people in his work as a journalist was an assertion of fact.

In *Myers*, *supra*, we held that the statement that Myers, a local television sports announcer, "is enrolled in a course for remedial speaking" could only be interpreted as an expression of opinion, or critical judgment and was, therefore, nonactionable. We reached this decision after examining the context in which the statement was made noting that "[r]emoved from context, the statement passes for a factual proposition whose sense is clear." *Id.* at 915.

Similarly, the statements made by Konowitz can only be viewed as expressions of opinion regarding Cole's reporting abilities. Whether a reporter is sloppy and irresponsible with bad techniques is a matter of opinion. The meaning of these statements is imprecise and open to speculation. They cannot be characterized as assertions of fact. They cannot be proved false. "An assertion that cannot be proved false cannot be held libellous." *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), cert. denied sub nom. *Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977).

The plaintiff argues that even if the statements are viewed as opinions they are actionable because they imply the allegation of undisclosed defamatory facts as the basis for the opinion. Section 566 of Restatement (Second) of Torts (1977) states: "Expressions of Opinion. A defamatory

communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Comment *c* of § 566, at 173 states: "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. . . . It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct . . . ." When the statements are viewed within their context, they do not imply the allegation of undisclosed defamatory facts as their basis. It was disclosed by the press release that Cole was terminated for "misconduct and insubordination." This was the stated reason for his dismissal. There was also discussion of Cole's conduct in reporting the Boston Finance Commission hearing. These are the "facts" underlying the opinion. While Konowitz's statements may also imply that she had knowledge of other instances of Cole's alleged shortcomings as a reporter, this possibility does not meet the requirements of § 566. Even assuming that the statements imply other undisclosed facts, in order for an opinion to be actionable, the undisclosed facts must be defamatory.

In the present case, it is not clear that any undisclosed facts are implied, or if any are implied, it is unclear what they are. Finally, it is entirely unclear (even assuming that facts are implied) that they are defamatory facts. We therefore find no merit in the plaintiff's argument that the opinion is actionable on the basis of underlying assumed defamatory facts.

4. *Conclusion.* We need not respond to the arguments concerning the nature of malice and public figures because we hold that the statements under review are opinions and that as opinions they do not subsume defamatory facts and hence, they do not constitute actionable defamation.

Judgment reversed.

Judgment for the defendants.

Supreme Judicial Court
for the Commonwealth of Massachusetts

APPENDIX B
S.J.C.- 2644

JOHN D. COLE, III v. WESTINGHOUSE BROADCASTING COMPANY, INC./ ET AL

A.C. No.: 81-805

TRIAL COURT: Suffolk Superior
No.: 5814
NATURE OF CASE: Tort

APPEAL BY: Westinghouse Broadcasting Company, Inc. and Seymour Yanoff, & plaintiff
EX.:

REP'D.:

TR.:

REP'D.:

ARGUED: 2-1-82

QUORUM: C J L N O

DECIDED: 5/20/82 REHEARING: _____ ALLOWED ☐ DENIED ☐

Direct Review M- 1990 Further Review M- _____ Sua Sponte 10/27/81

COUNSEL FOR PLAINTIFF — BRIEF TWC

Altman & Lapon (864-6200)
Stanley R. Lapon
687 Massachusetts Ave., Cambridge 02139
Peabody & Arnold (523-2100)
Alexander H. Pratt, Jr.
Harvey Weiner
1 Beacon St., Boston 02108

COUNSEL FOR DEFENDANT — BRIEF TWC

Nutter, McClennen & Fish
Mary Lee Jacobs (973-9700)
Mary M. Logalbo, Charles R. Parrott
600 Atlantic Ave., Boston 02210

11/5/81	Entered.
11-4-81.	Service of Brief for Plaintiff/Appellee by Peabody & Arnold (Alexander H. Pratt, Jr., Harvey Weiner).
11-18-81	Service of Reply Brief for Appellants by NUTTER, MC CLENNEN & FISH (Charles R. Parrot & Mary Lee Jacobs
12-4-81.	Service of Reply Brief for Appellee by Peabody & Arnold (Alexander H. Pratt, Jr., Harvey Weiner).
5/20/82	Judgment reversed. Judgment for the defendants. Rescript May 20, 1982. Reasons as on file. Notice to counsel.
6/2/82	Petition for Rehearing No. 279.
6/25/82	Petition for Rehearing DENIED.

A true copy:
Clerk
September 16,1982

APPENDIX C

Mass. R. Civ. P. 50, 365 Mass. 730, 814 (1974).

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) Motion for Directed Verdict: When Made; Effect. A party may move for a directed verdict at the close of the evidence offered by an opponent, and may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A party may also move for a directed verdict at the close of all the evidence. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the

judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Office - Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-499

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN D. COLE, III,
PETITIONER,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC., SEYMOUR YANOFF and AMY KONOWITZ,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

CHARLES R. PARROTT*
JOSEPH J. HURLEY
MARY LEE JACOBS
NELSON G. APJOHN
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, Massachusetts 02210
(617) 973-9700
Attorneys for Respondents

* *Counsel of Record*

Standard Press, Inc., Boston, Mass.—Law Printers

Questions Presented[1]

1. Whether special and important reasons exist why this Court should consider the issues sought to be raised by the petition?

2. Whether the state court's decision that respondents' right to appellate review in the state court of a given issue had been preserved under Massachusetts Rules of Civil Procedure is or is not the decision of a federal question reviewable by this Court under 28 U.S.C. § 1257(3)?

3. Whether the state court's decision that allegedly defamatory statements, attributable to respondents, concerning the reasons for the discharge of petitioner, a television news reporter (that petitioner was discharged because of "sloppy and irresponsible reporting" and "a history of bad reporting techniques") were statements of opinion (and therefore not actionable), rather than statements of fact, is a decision reviewable by this Court under 28 U.S.C. § 1257(3), since the decision rested upon adequate and independent state grounds?

4. Whether in the absence of decision by the state court of an issue raised by petitioner in the state court (that his discharge was a "private matter" to which the rule of *New York Times Co.* v. *Sullivan* does not apply) is an issue reviewable by this Court under 28 U.S.C. § 1257(3)?

---

[1] Pursuant to Rule 28.1 of the Rules of the Supreme Court, respondent, Westinghouse Broadcasting Company, Inc., whose corporate name was changed on May 1, 1982, to Westinghouse Broadcasting and Cable, Inc., hereby lists all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates. They are as follows:

Westinghouse Electric Corporation (parent company) and CATV Enterprises, Inc. (a subsidiary in which respondent owns a 49% interest). This listing does not include non-wholly owned subsidiaries of the respondent's parent corporation, Westinghouse Electric Corporation, as it is respondent's understanding that such further listing is not required by Rule 28.1.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinion Below	1
Summary of Argument	2
Statement of Case	2
Argument	3
I. There Are No Special and Important Reasons Why This Court Should Consider the Issues Sought To Be Raised by the Petition	3
II. The State Court's Decision That a Given Issue Was Open on the Record Before It Under the Massachusetts Rules of Civil Procedure Raises No Issue for This Court	4
III. The State Court's Decision That Allegedly Defamatory Statements Were Statements of Non-Actionable Opinion, Rather Than Statements of Fact, Rests Upon Adequate and Independent State Tort Law and Is Therefore Not Subject to Review	7
IV. The State Court Did Not Decide Whether a "Private Matter" Limitation Exists With Respect to the Doctrine of *New York Times Co.* v. *Sullivan*, Nor Was the Decision of Such Issue Necessary to, or Implicit in, the State Court Decision,	9
Conclusion	11
Appendix A: Supreme Judicial Court Opinion	A-1

TABLE OF AUTHORITIES CITED

Cases

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	10
Edwards v. *National Audubon Society Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977)	7
Fox Film Corp. v. *Muller*, 296 U.S. 207 (1935)	2

Page

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)..... 11

Good Government Group of Seal Beach, Inc. v. *Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 (1978), *cert. denied*, 441 U.S. 961 (1979)..... 7

Herb v. *Pitcairn*, 324 U.S. 117 (1945)..... 2

Honeyman v. *Hanan*, 300 U.S. 14 (1937)..... 10

Hotchner v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977)..... 7

Information Control Corp. v. *Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980)..... 8

John v. *Paullin*, 231 U.S. 583 (1913)..... 6

Lynch v. *New York*, 293 U.S. 52 (1934).....5, 9

Minnesota v. *National Tea Co.*, 309 U.S. 551 (1940).....5, 10

Myers v. *Boston Magazine Co.*, Mass. Adv. Sh. (1980) 907, 403 N.E.2d 376 (1980)..... 8

National Association of Government Employees, Inc. v. *Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980) 7

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) i
5, 9

Osborne v. *Clark*, 204 U.S. 565 (1907)..... 5

Palmer Oil Corp. v. *Amerada Petroleum Corp.*, 343 U.S. 390 (1952)..... 10

Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945) 6

Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955)..... 4

Rinaldi v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977)..... 7

Wolfe v. *North Carolina*, 364 U.S. 177 (1960)..... 6

Zucht v. *King*, 260 U.S. 174 (1922)..... 10

Statutes

28 U.S.C. § 1257 9
§ 1257(3)..... i, 2

Page

Rules of Court

Sup. Ct. R. 17.1(b) 10

Miscellaneous

Restatement (Second) of Torts § 566 (1977)..... 8

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-499

JOHN D. COLE, III,
PETITIONER,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC., SEYMOUR YANOFF and AMY KONOWITZ,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Respondents, Westinghouse Broadcasting Company, Inc. ("Westinghouse"), Seymour Yanoff ("Yanoff"), and Amy Konowitz ("Konowitz"), hereby oppose the subject petition of John D. Cole for a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Massachusetts (the "state court").

Opinion Below

The opinion of the state court (the "decision") is reported at 386 Mass. 303 (1982) and at 435 N.E.2d 1021 (Mass. 1982). A copy of the decision is set forth in Appendix A.

Summary of Argument

The petitioner, John D. Cole ("Cole") has failed to satisfy the jurisdictional requirements of 28 U.S.C. § 1257(3) in that the judgment of the state court rests upon adequate and independent procedural or substantive state grounds. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). Moreover, Cole has failed to demonstrate special and important reasons for this Court to exercise its jurisdiction, even assuming jurisdiction exists. Cole presents issues for review that are purely episodic in that they are confined to the parties and the facts presented. Furthermore, the result reached by the state court was not grounded solely upon an adjudication of federal rights. The state court ruled that Cole had failed to establish a *prima facie* case of defamation as a matter of law as the alleged defamatory statements were found to be non-actionable personal opinions. Thus, this case is not an appropriate one for review by this Court because, while the state court considered constitutional principles, the judgment is supported by non-constitutional grounds.

Statement of Case

The only relevant facts material to the questions presented are as follows as derived from the state court opinion (Appendix A):

This defamation action concerns statements made regarding the dismissal of Cole, a well-known (in Boston) television news personality, as evidenced by the fact that the jury found him to be a public figure. (Appendix A at 2a). In March, 1975, WBZ-TV ("WBZ")[2] dismissed Cole statedly for reasons of mis-

[2] WBZ is a broadcasting entity owned and operated by respondent Westinghouse; Yanoff is the general manager of WBZ; and, Konowitz was the official spokesperson for WBZ. (Appendix A at 2a).

conduct and insubordination. (Appendix A at 3a). In responding to media inquiries regarding Cole's termination, a WBZ representative stated that the "unofficial" reasons for Cole's termination were his "sloppy and irresponsible reporting" and "a history of bad reporting techniques." (Appendix A at 3a, 4a). In April, 1975, Cole commenced this action against respondents, claiming that the statements by WBZ were defamatory. (Appendix A at 2a, 4a).

At the trial of Cole's action, the jury returned a verdict in Cole's favor, assessing damages of $100,000, against Westinghouse and Yanoff. (Appendix A at 2a). Respondents Westinghouse and Yanoff appealed from the judgment and the denial of their respective motions for judgment notwithstanding the verdict or for a new trial. *Id.* Cole filed a cross-appeal. *Id.* The state court reversed the judgment for Cole and ordered judgment for respondents. (Appendix A at 2a, 11a). The state court held that the alleged defamatory statements were opinions not subsuming defamatory facts and, therefore, did not constitute actionable defamation. (Appendix A at 11a). The state court did not reach issues presented concerning the nature of malice and public figures. *Id.*

Argument

I. There Are No Special And Important Reasons Why This Court Should Consider The Issues Sought To Be Raised By The Petition.

A decision of any of the issues sought to be raised by the petition would rest solely upon the facts of this case and would have no decisional effect other than upon the parties to this proceeding. Cole has failed to demonstrate any special and important reasons why this court should consider the issues presented for review.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.... "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341.

Rice v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

II. The State Court's Decision That A Given Issue Was Open On The Record Before It Under The Massachusetts Rules Of Civil Procedure Raises No Issue For This Court.

Cole's argument that the state court misconstrued the decisions of this Court as requiring it to depart from state procedural rules is entirely without merit. On appeal to the state court, Cole argued that the issue of whether the alleged defamatory statements were fact or opinion was not properly preserved for review. (Appendix A at 5a). Specifically, Cole contended that the issue was not before the state court "because the defendants' motions for directed verdicts did not explicitly rely on the ground that the phrases were nonactionable opinions, but instead asserted that there was no evidence to warrant a jury finding of actual malice on the part of the defendants." *Id.*

The state court ruled, however, that the issue was properly before them "for *several* reasons." *Id.* (emphasis added). In particular, the court stated three reasons why the specificity of defendants' motions for directed verdicts was sufficient:

> [1] The judge had adequate notice of [the] issue which was fully presented at the pre-trial stage and again at the post-trial stage. [2] In addition, the issue whether sufficient evidence of a defendant's required state of mind exists is closely connected to the issue whether the statement can be characterized as an opinion or a fact. [3] Finally, in a case of this type where constitutional issues are presented [the Supreme Judicial Court's] role as a reviewing court is necessarily broad. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964).

(Appendix A at 5a, 6a). Certainly, the state court may decide, as a matter of state law, that it will construe its state procedural rules in a manner that does not foreclose review of issues on purely technical grounds. The mere reference to *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), by the state court with respect to the third reason, that constitutional issues were presented, does not establish that the state court rested its decision on constitutional grounds. *See Lynch* v. *New York*, 293 U.S. 52, 54 (1934); *Osborne* v. *Clark*, 204 U.S. 565, 567-68 (1907). Indeed, it is apparent from the context of such reference that the state court cited *New York Times Co.* v. *Sullivan* merely as a persuasive authority in determining independently its role as a reviewing court. Nevertheless, the state court's use of this Court's decisions as collateral authority does not create a ground for this Court to invoke its jurisdiction. *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556 (1940).

Even assuming that the state court's third and final reason for rejecting Cole's procedural argument rested in part on constitutional grounds, however, there were two independent and adequate state law grounds for its decision. It is a settled rule

that "this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 129 (1945). Here, the state court specificially noted two additional grounds for its holding, neither of which related to the fact that constitutional issues were presented for review.

As this Court recognized in *John* v. *Paullin*, 231 U.S. 583, 585 (1913):

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

See also Wolfe v. *North Carolina*, 364 U.S. 177, 195 (1960). Indeed, Cole recognizes that "[i]t is well settled that, in the absence of evasion, state procedures govern the raising and preservation of even constitutional issues." (Cole Petition at 13).[3] No question concerning the evasion of federal questions is presented or argued here. This Court should reject, therefore, Cole's ill-founded attempt to transform the decision resting on state procedural grounds into a matter worthy for review by this Court.

---

[3] It is clear from the fact that the Petition sets forth an extended argument on the merits of this issue that Cole is asking this Court to depart from its established practice of declining to review a state court's construction of its own procedural rules. *See* Cole Petition at 10-12, 14-15.

III. The State Court's Decision That Allegedly Defamatory Statements Were Statements Of Non-Actionable Opinion Rather Than Statements Of Fact, Rests Upon Adequate And Independent State Tort Law And Is Therefore Not Subject To Review.

The state law dispositive ground underlying the state court decision is that the alleged defamatory phrases constituted the expression of a non-actionable opinion and could not reasonably be viewed as statements of fact when viewed in the context in which the statements were made. (Appendix A at 11a). After examining that context, the state court found that statements that Cole was guilty of "sloppy and irresponsible reporting" and had a "history of bad reporting techniques" were an expression of opinion as to Cole's reporting abilities in that the meaning of the statements was "imprecise and open to speculation" and could not be proven false. (Appendix A at 8a, 10a). Accordingly, it is clear that the ruling that the statements did not constitute a defamatory opinion rested upon wholly independent state law grounds.[4]

Despite the clear disposition of this matter on state law grounds, Cole seeks to characterize the decision as involving the application of the First and Fourteenth Amendments by claiming that the distinction drawn by the state court between assertions of fact and expressions of opinion (the "fact/opinion distinction") has constitutional significance. Such a claim by

[4] The Supreme Court has denied certiorari in the following defamation cases, which appear to involve the issue of whether a statement was one of fact or opinion and hence non-actionable: *See, e.g., National Association of Government Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980); *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 434 U.S. 969 (1977); *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Good Government Group of Seal Beach, Inc.* v. *Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 (1978), *cert. denied*, 441 U.S. 961 (1979).

Cole is clearly incorrect. Section 566 of the *Restatement (Second) of Torts* (1977), as adopted and applied by the state court, distinguishes between a false assertion of fact and a derogatory opinion in that the latter "is actionable only if it implies the allegation of undisclosed *defamatory* facts as the basis for the opinion." (Appendix A at 10a, 11a) (emphasis added).

The conclusion by the state court that the statements in question constituted non-actionable opinion (which Cole had failed to establish below were based upon undisclosed defamatory facts) rests upon established principles of state tort law. The state court applied the state standard of review established by it in *Myers* v. *Boston Magazine Co.*, Mass. Adv. Sh. (1980) 907, 403 N.E.2d 376 (1980), with respect to the evaluation of challenged statements as actionable assertions or non-actionable opinion. That standard is as follows:

> [T]he test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Mass. Adv. Sh. (1980) at 913, 403 N.E.2d at 379 (quoting from *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980)).

Cole cannot transform his failure to meet his burden of proof at the trial level into a matter meriting review by this Court in view of the state court's clear dispositive application of state

law. In short, the application by the state court of the fact/opinion rule does not raise a jurisdictionally substantial federal question, indeed any federal question whatsoever.

IV. The State Court Did Not Decide Whether A "Private Matter" Limitation Exists With Respect To The Doctrine Of *New York Times* v. *Sullivan*, Nor Was The Decision Of Such Issue Necessary To, Or Implicit In, The State Court Decision.

Cole contends that the state court "implicitly" rejected his contention on cross-appeal that constitutional standards do not apply to cases of private defamation. (Cole Petition at 8). The state court, however, did not consider this issue because there was not any reason to do so. In its decision, the state court concluded "[w]e need not respond to the arguments concerning the nature of malice and public figures because we hold that the statements under review are opinions and that as opinions they do not subsume defamatory facts and hence, they do not constitute actionable defamation." (Appendix A at 11a).

Consequently, because it is readily apparent that the state court did not decide the issue of whether constitutional standards apply to private defamation, this Court lacks the requisite jurisdiction under 28 U.S.C. § 1257 to consider this issue. As Chief Justice Hughes observed in *Lynch* v. *New York*, 293 U.S. at 54:

> It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

See also Honeyman v. *Hanan*, 300 U.S. 14, 18 (1937). Thus, a petitioner must show not only that a federal question was presented to the highest state court, but also that the state court expressly or necessarily decided the federal question.[5] Cole cannot satisfy that requirement.

The state court expressly stated, in light of its holding that the subject words were non-actionable, it was unnecessary to decide the argued federal questions concerning the respondents' state of mind or standard of care. Even if the state court's decision could be construed as ambiguous in this regard (which respondents suggest is not the case), in determining its jurisdiction on certiorari this Court should choose that interpretation of the opinion that does not present a constitutional question. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 299 (1956). Granting review of the issue — whether constitutional standards apply to cases of private defamation — would be inconsistent "with the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case." *Minnesota* v. *National Tea Co.*, 309 U.S. at 555.

Finally, it is the Court's "duty to decline jurisdiction whenever it appears that the constitutional question presented is not, . . . substantial in character." *Zucht* v. *King*, 260 U.S. 174, 176 (1922). *See also Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390, 391 (1952). Cole states that the question presented on his cross-appeal was the "applicability of the constitutional standards initially enunciated in *New York Times Co.* v. *Sullivan* to a case of a private plaintiff (i.e., a public figure but in relation to a private matter) and a non-media defendant." (Cole Petition at 10). Nevertheless, Cole's argument based on this presumed "private

[5] Indeed, Sup. Ct. R. 17.1(b) presupposes that the state court of last resort has "decided" the federal question presented for review.

matter" distinction in regard to his public figure status is wholly untenable. Cole was a public figure for all purposes of this case.[6] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345, 352 (1974).

Conclusion

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

CHARLES R. PARROTT*
JOSEPH J. HURLEY
MARY LEE JACOBS
NELSON G. APJOHN
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, Massachusetts 02210
(617) 973-9700
Attorneys for Respondents

* *Counsel of Record*

[6] Cole has never challenged the jury finding that he was a public figure.

APPENDIX A

JOHN D. COLE, III vs. WESTINGHOUSE BROADCASTING COMPANY, INC. & another.[1]

Suffolk. February 1, 1982. — May 20, 1982.

Present: HENNESSEY, C.J., LIACOS, NOLAN, & O'CONNOR, JJ.

Libel and Slander. Practice, Civil, Appeal.

CIVIL ACTION commenced in the Superior Court on April 2, 1975.

The case was tried before *Good,* J.

The Supreme Judicial Court granted a request for direct appellate review.

Charles R. Parrott (Mary Lee Jacobs with him) for the defendants.

Alexander H. Pratt, Jr., & Harvey Weiner for the plaintiff.

---

[1] Seymour Yanoff.

NOLAN, J. The plaintiff, John D. Cole, III (Cole), brought this action in the Superior Court for alleged defamation by Westinghouse Broadcasting Company, Inc. (Westinghouse), WBZ-TV, Seymour Yanoff, individually and as general manager of WBZ-TV, Amy Konowitz, individually and as official spokesperson for WBZ-TV and Alan Frank, individually and as program manager of WBZ-TV. At the close of the plaintiff's case, the trial judge allowed motions by Frank and Konowitz for directed verdicts, but denied similar motions by Westinghouse and Yanoff.[2] Westinghouse and Yanoff renewed their motions for directed verdicts at the conclusion of the trial and those motions were denied. In response to a special question, the jury found Cole to be a public figure. They returned a verdict in Cole's favor and assessed damages of $100,000. Westinghouse and Yanoff appealed from the judgment on the jury verdict and the denial of their motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. Cole cross-appealed from the judgment entered in favor of Konowitz. We allowed the defendants' application for direct appellate review. We reverse the judgment for Cole.

The evidence may be summarized as follows. Cole began his employment with WBZ-TV in 1969 as a staff reporter. From July, 1971, to July, 1974, he was employed under a written contract as a staff news announcer. Following the expiration of Cole's employment contract in July, 1974, he continued employment with WBZ-TV as a general assignment reporter covered by a collective bargaining agreement. Yanoff became the general manager of WBZ-TV in August, 1973. One William Alber was hired as WBZ-TV news director in October, 1974.

During the winter of 1974-1975, WBZ-TV broadcast a series of reports which Cole had prepared concerning the political fundraising of the mayor of Boston, Kevin White, and his use of the Parkman House. On March 13, 1975,

[2] As to the defendant WBZ-TV see discussion *infra*.

Cole covered a meeting of the Boston Finance Commission (commission) at which the commission voted to investigate Mayor White's fundraising activities. Cole's report was broadcast on the evening news. Aber observed Cole's report and also viewed a broadcast by another local television station which aired a film of Mayor White commenting on the vote of the commission. Cole's report did not include the Mayor's comment although Cole had been told by a WBZ-TV news director that the film was available for use. Yanoff testified at trial that Aber met with him on March 13, 1975, and informed him of the events of the day. The following day Yanoff reviewed written statements prepared by Aber and three members of the news staff concerning the broadcast. Aber recommended Cole's termination on the grounds of "misconduct and incompetence" and detailed the incident concerning the omission of Mayor White's comments which led to this recommendation. Cole was suspended and terminated about one week later.

Yanoff prepared an official statement to be released when the television station received inquiries relating to Cole's termination. The release stated that Cole had been terminated "for reasons of misconduct and insubordination." Yanoff testifed at trial that he gave the statement to one Alex Dusek and directed Dusek to give it to Amy Konowitz to use in responding to inquiries from the media.

On March 21, 1975, an article appeared in the Boston Globe newspaper, by Percy Shain, stating that Cole had been fired for "misconduct and insubordination." The article mentioned the incident involving the commission and went on to say that a WBZ-TV spokesman said "unofficially, the Cole's firing was not a direct result of the newscast, but was a case of 'sloppy and irresponsible' reporting." Shain testifed at trial that, prior to writing the article, he had called Konowitz and inquired about Cole's suspension. Konowitz read him the official release. Shain then asked her for more information and she said "unofficially" that it was a case of "sloppy and irresponsible reporting." This

is one of the statements which Cole claims to be defamatory.

About the same time, David O'Brian, a columnist for the Boston Phoenix newspaper, telephoned WBZ-TV, and spoke with Konowitz. He testified that he asked her why Cole had been terminated and she read to him the WBZ-TV's official statement. He then stated to her that he had heard that Cole had been fired because of the way he had handled the report on the Boston Finance Commission's press conference. Konowitz replied: "That was just the last straw. Jack was fired for a history of bad reporting techniques." O'Brian wrote a column published in the Boston Phoenix newspaper quoting this statement. Cole alleged that this statement was defamatory.

1. *Prematurity of appeal.* Before reaching the merits of this appeal, we shall discuss two preliminary issues raised by the plaintiff. The plaintiff argues that this appeal should be dismissed because of the defendants' failure properly to file notices of appeal. The plaintiff filed a complaint against Westinghouse, WBZ-TV, Yanoff, Konowitz, and Frank. The judge allowed motions for directed verdicts as to Konowitz and Frank. On October 31, 1980, the jury returned a verdict for the plaintiff, on which judgment was entered on November 3, 1980. Westinghouse and Yanoff timely moved for judgments notwithstanding the verdict or, in the alternative, for a new trial. The judge denied the motions on December 23, 1980. On January 21, 1981, Yanoff and Westinghouse filed notices of appeal from the judgment on the jury verdict and the denial of their motions. The plaintiff filed a cross-appeal on January 30, 1981, from the judgment entered in favor of Konowitz. On March 3, 1981, the parties filed a stipulation of dismissal as to WBZ-TV. The plaintiff argued that since judgment was not entered for WBZ-TV until March 6, 1981, the case was not ripe for appeal until that time and the defendants' appeals filed on January 21, 1981, were premature and ineffective.

WBZ-TV is owned and operated by Westinghouse. Although WBZ-TV was designated a separate entity in the

complaint, it is clear that the parties treated WBZ-TV and Westinghouse as one and the same throughout the litigation. Cole did not ask for a judgment against WBZ-TV and filed his notice of cross-appeal from the same judgment from which the defendants appealed in January, 1981. The plaintiff has not been prejudiced by the prematurity, if any, of the notice of appeal and we will not avoid a decision on the merits on the basis of such a technicality. *Hutchinson* v. *Hutchinson*, 6 Mass. App. Ct. 705, 707 (1978), and cases cited.

2. *Specificity of motions for directed verdicts.* The plaintiff next contends that the issue whether the statements alleged to be defamatory constitute fact or opinion has not been properly preserved for review. The plaintiff argues that the issue is not before us because the defendants' motions for directed verdicts did not explicitly rely on the ground that the phrases were nonactionable opinions, but instead asserted that there was no evidence to warrant a jury finding of actual malice on the part of the defendants. We find that the issue is properly before us for several reasons. The defendants, in their oral argument on their motion to dismiss at the outset of the trial, argued at length that the action should be dismissed because the statements were nonactionable opinions. The judge declined to rule on the motion, stating essentially that he wanted to hear evidence concerning the circumstances in which the statements were made before determining their nature. At the directed verdict stage, while the defendants did not expressly raise this issue, they based their motions for a directed verdict on the lack of evidence which would warrant a finding of actual malice on the part of the defendants. Finally, in their motions for judgment notwithstanding the verdict the defendants expressly raised the opinion versus fact issue. While the defendants perhaps should have explicitly included the opinion versus fact distinction in their motions for directed verdicts, their failure to do so does not bar our review of that issue now. The judge had adequate notice of this issue which was fully presented at the pretrial stage

and again at the post-trial stage. In addition, the issue whether sufficient evidence of a defendant's required state of mind exists is closely connected to the issue whether the statement can be characterized as an opinion or a fact. Finally, in a case of this type where constitutional issues are presented, our role as a reviewing court is necessarily broad. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964). We now discuss the merits.

Because the plaintiff is a public figure, this libel action is governed by the constitutional principles first set forth in *New York Times Co.* v. *Sullivan, supra*. Our role in reviewing a libel case of this kind requires careful appellate review of the facts. We must "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect . . . We mustn't 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression" (citations omitted). *Id.* at 285. After undertaking such a review in this case we conclude that the jury verdict for the plaintiff must be set aside. The alleged defamatory statements are nonactionable opinions.

3. *The statements as opinions.* Recently, in *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, Mass. Adv. Sh. (1979) 2485, cert. denied, 446 U.S. 935 (1980), and again in *Myers* v. *Boston Magazine Co.*, Mass. Adv. Sh. (1980) 907, we discussed the law governing defamatory opinions. We started with the premise that "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). The determination whether the allegedly defamatory statements constitute fact or opinion is critical. "In this context courts apply the Constitution by carefully distinguishing between

statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse." *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976). The determination whether a statement is one of fact or opinion is generally considered a question of law. In *Greenbelt Coop. Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 13-14 (1970), the Supreme Court set aside a jury verdict and held that the use of the word "blackmail" to describe the conduct of the plaintiff in that case could not have been understood as a statement of fact and therefore was not libelous as a matter of law. Similarly, in *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 283 (1974), the Court held that the publication of Jack London's definition of "scab," containing words suggesting that the plaintiffs had "rotten principles," and were "lacking character," did not constitute libel. "Such words were obviously used...in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most pejorative terms, is protected under federal labor law." *Id.* at 284. In *Myers* v. *Boston Magazine, Inc.*, *supra* at 912, we applied these principles and held as a matter of law that the statement at issue there was an opinion and could not be the basis of a libel action.

In deciding whether statements can be understood reasonably as fact or opinion "the test to be applied...requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published." *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). See *New York Times Co.* v. *Sullivan*, 376 U.S. 254,

285 (1964); *Buckley* v. *Littell*, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977). We applied this test in *Myers*, *supra*, and now apply it here.

The two columnists, Percy Shain and David O'Brian, telephoned Konowitz, in her capacity as a spokesperson for WBZ-TV, seeking information concerning Cole's dismissal. Konowitz read them both the official release which stated in part that Cole was dismissed because of "misconduct and insubordination." Cole did not contend in his complaint that this statement was defamatory. It was only upon further questioning that Konowitz stated "unofficially" that Cole's dismissal was due to "sloppy and irresponsible reporting" and a "history of bad reporting techniques." It is important to our analysis that Cole was a public figure at the time of this incident and that the circumstances surrounding his dismissal were a matter of public interest, as evidenced by the newspaper articles published concerning his dismissal. The official statement prepared by WBZ-TV stated that Cole was contesting his dismissal. Cole testified that he spoke with a member of the press at that time and expressed his view that political pressures played a role in his dismissal. While the situation was probably not the type of heated "public debate" in which "voices could be expected to be raised in sloganeering invective," *National Ass'n of Gov't Employees* v. *Central Broadcasting Corp.*, Mass. Adv. Sh. (1979) 2485, 2493, the context of the statements is a significant factor in our determination of how they could reasonably be understood. As the California court wrote in *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976), "what constitutes s statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion."

Here, the fact that the statements were made in response to inquiries concerning the contested dismissal of a public figure is of some significance in how they could be reasonably interpreted. The audience which received the statements, first the reporters and later those reading the newspaper articles, were aware that Cole and WBZ-TV claimed different reasons for Cole's contested dismissal. The newspaper articles included this information. Both reporters acknowledged that Konowitz had made the statements at issue only in response to their further questioning and after qualifying her remarks as "unofficial." The reporters testified that they understood that her statements were not part of the television station's release. These factors lend support to our view that the statements were matters of opinion rather than fact.

A review of recent cases in which the opinion versus fact distinction was applied strengthens our view that the phrases "sloppy and irresponsible reporting" and "history of bad reporting techniques," when viewed in their context, could not reasonably be viewed as statements of fact. The case of *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 376, cert. denied, 434 U.S. 969 (1977), involved assertions published by the defendant which stated that a certain judge was among the ten worst judges in New York, had made a "sufficient pattern of incompetent decisions" and should be removed from judicial office. The court held these statements to be nonactionable expressions of opinion, stating that the "[p]laintiff may not recover from defendants for simply expressing their opinion of his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be." *Id.* at 380-381. The court distinguished the statement that the plaintiff was "probably corrupt" as this was an accusation of criminal activity that could be proved true or false. *Id.* at 381-382. *Edwards* v. *National Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir.), cert. denied sub nom. *Edwards* v. *New York Times Co.*, 434 U.S. 1002 (1977), was an action sounding in defamation brought by certain scientists based on publication of an

article accusing them of being "paid liars" in regard to their support of the continued use of the insecticide DDT. The court distinguished between the phrase "paid liars" and "liars," stating that the first would be actionable as it implies corruption and can be proved true or false whereas the word "liar" merely expressed an opinion and could not be libelous, however mistaken the opinion might be. In *Buckley* v. *Littell*, 539 F.2d 882, 884-885 & n.1 (1976), the court held that the phrases published in a book concerning extremism which stated that the plaintiff was a "fascist," "fellow traveler" of fascism and printed " 'news items' and interpretations picked up from the openly fascist journals" were matters of opinion and protected ideas, while the assertion that the plaintiff had lied about and libeled several people in his work as a journalist was an assertion of fact.

In *Myers*, *supra*, we held that the statement that Myers, a local television sports announcer, "is enrolled in a course for remedial speaking" could only be interpreted as an expression of opinion, or critical judgment and was, therefore, nonactionable. We reached this decision after examining the context in which the statement was made noting that "[r]emoved from context, the statement passes for a factual proposition whose sense is clear." *Id.* at 915.

Similarly, the statements made by Konowitz can only be viewed as expressions of opinion regarding Cole's reporting abilities. Whether a reporter is sloppy and irresponsible with bad techniques is a matter of opinion. The meaning of these statements is imprecise and open to speculation. They cannot be characterized as assertions of fact. They cannot be proved false. "An assertion that cannot be proved false cannot be held libellous." *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), cert. denied sub nom. *Hotchner* v. *Doubleday & Co.*, 434 U.S. 834 (1977).

The plaintiff argues that even if the statements are viewed as opinions they are actionable because they imply the allegation of undisclosed defamatory facts as the basis for the opinion. Section 566 of Restatement (Second) of Torts (1977) states: "Expressions of Opinion. A defamatory

communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Comment *c* of § 566, at 173 states: "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.... It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct...." When the statements are viewed within their context, they do not imply the allegation of undisclosed defamatory facts as their basis. It was disclosed by the press release that Cole was terminated for "misconduct and insubordination." This was the stated reason for his dismissal. There was also discussion of Cole's conduct in reporting the Boston Finance Commission hearing. These are the "facts" underlying the opinion. While Konowitz's statements may also imply that she had knowledge of other instances of Cole's alleged shortcomings as a reporter, this possibility does not meet the requirements of § 566. Even assuming that the statements imply other undisclosed facts, in order for an opinion to be actionable, the undisclosed facts must be defamatory.

In the present case, it is not clear that any undisclosed facts are implied, or if any are implied, it is unclear what they are. Finally, it is entirely unclear (even assuming that facts are implied) that they are defamatory facts. We therefore find no merit in the plaintiff's argument that the opinion is actionable on the basis of underlying assumed defamatory facts.

4. *Conclusion.* We need not respond to the arguments concerning the nature of malice and public figures because we hold that the statements under review are opinions and that as opinions they do not subsume defamatory facts and hence, they do not constitute actionable defamation.

Judgment reversed.

Judgment for the defendants.

Office - Supreme Court, U.S.
FILED
NOV 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-499.

In the

Supreme Court of the United States.

OCTOBER TERM, 1982.

JOHN D. COLE, III,
Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
SEYMOUR YANOFF AND AMY KONOWITZ,
RESPONDENTS.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

PAUL R. DEVIN,

ALEXANDER H. PRATT, JR.,
HARVEY WEINER,
PEABODY & ARNOLD,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 523-2100

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

I. Reasons for granting the writ 2

II. The impact of *New York Times Co.* v. *Sullivan* on the State Rule for judgment notwithstanding the verdict 3

III. Whether the First Amendment renders the statements at issue non-actionable 3

IV. Applicability of constitutional standards generally 4

V. Conclusion 4

Table of Authorities Cited.

Cases.

Enterprise Irrig. Dist. v. Canal Co., 243 U.S. 157 (1917) 3

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 3

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 2, 3

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 2

Statutes.

United States Constitution

First Amendment 2, 3

Fourteenth Amendment 2

No. 82-499.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

JOHN D. COLE, III,
Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY, INC.,
SEYMOUR YANOFF AND AMY KONOWITZ,
RESPONDENTS.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

Petitioner John D. Cole, III, responds to the respective sections of the respondents' brief in opposition to his petition for a writ of certiorari.

I. Reasons for Granting the Writ.

The respondents simply assert, without supporting facts or argument, that the questions presented by Cole have no significance beyond the specific controversy between the parties (Opposition, p. 3). This is not true. Each of the three issues presented by Cole involves, in a somewhat different way, the question of the extent to which this Court's decisions under the First and Fourteenth Amendments are to displace state law of substance or procedure in defamation cases. Prior to *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this was thought to be the preserve of state law. Having declared the applicability of the First and Fourteenth Amendments to this field, this Court cannot now abdicate its responsibility to define on a case-by-case basis, which is the only means available, the extent of the Constitution's control. It is, of course, for this Court to determine how important these questions of federalism are, but the respondents are incorrect in asserting that Cole has presented no questions of federalism at all.

The respondents seem to suggest by the quotation from *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (Opposition, p. 4), that this Court should be totally indifferent to injustice between the parties. After listening to sharply conflicting evidence, the jury concluded the two-week trial with a verdict for Cole, finding that the television station had fired and defamed him to appease Boston Mayor White and to implement the "happy talk" news show. Even though it had no opportunity to judge the credibility of the witnesses, the Supreme Judicial Court totally ignored Cole's version of the evidence and reversed, relying on misinterpretations of the decisions of this Court. The errors have been committed in the name of this Court's decisions, and only this Court can correct them.

II. The Impact of New York Times Co. v. Sullivan on the State Rule for Judgment Notwithstanding the Verdict.

The respondents assert (Opposition, p. 5) that the Supreme Judicial Court's reading of *New York Times Co.* v. *Sullivan, supra*, as requiring it to disregard its settled practice for judgment notwithstanding the verdict is independent of state grounds. However, there is nothing in the Supreme Judicial Court's opinion to support this assertion. The Supreme Judicial Court's three reasons for not requiring the directed verdict motion as a foundation for the motion for judgment notwithstanding the verdict are stated cumulatively, not in the alternative. (Appendix A to the petition, pp. 5a-6a.) At the very least, the two non-constitutional reasons are so interwoven with the constitutional reason so as not to be independent and were seen by the Supreme Judicial Court as insufficiently broad to sustain the decision without the constitutional reason. *Enterprise Irrig. Dist.* v. *Canal Co.*, 243 U.S. 157, 164 (1917) (*see* Petition, p. 2).

III. Whether the First Amendment Renders the Statements at Issue Non-Actionable.

Next, the respondents assert that the Supreme Judicial Court's decision that the statements in question were non-actionable matters of opinion rests entirely on state law (Opposition, p. 8). Totally ignored by this assertion is the fact that state law in this area has been bounded and shaped by the requirements of the First Amendment as stated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974):

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we

> depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. (Footnote omitted.)

It is simply incorrect for the respondents to assert that it is not a federal question to determine where the constitutional dividing line is to be drawn.

IV. Applicability of Constitutional Standards Generally.

On the broader question of whether any constitutional standards apply to cases of private defamation, the respondents rely on an assertion that Cole did not raise this question below and that the Supreme Judicial Court did not decide it. The respondents state that "Cole has never challenged the jury finding that he was a public figure" (Opposition, p. 11 n.6). However, Cole cross-appealed from all of the trial court's instructions importing constitutional standards. It is true that the Supreme Judicial Court did not reach the constitutional issue of actual malice. However, the Supreme Judicial Court's decisions on constitutional grounds on other issues implicitly reject Cole's contentions on his cross-appeal.

V. Conclusion.

Because the Supreme Judicial Court of Massachusetts has decided important questions of federal law which have not been, but should be, settled by this Court, and has decided

such questions in a way in conflict with the applicable decisions of this Court, the petition should be granted.

Respectfully submitted,

PAUL R. DEVIN,

ALEXANDER H. PRATT, JR.,
HARVEY WEINER,
PEABODY & ARNOLD,
One Beacon Street,
Boston, Massachusetts 02108.
(617) 523-2100